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THE REAL ESTATE RECOVERY FUND: CONSTITUTIONAL AND PROCEDURAL CRITIQUE OF AN ILLINOIS REMEDY

Effective methods of protection are essential for the promotion of consumer interests.¹ The enactment of remedial legislation contributes to the development of consumer rights.² Accordingly, statutory regulation of real estate brokers and salesmen is designed to protect the public from persons not qualified to engage in the real estate business.³ Toward this end, the Illinois General Assembly adopted a new regulatory act in 1973,⁴ which was the genesis of the Illinois Real Estate Recovery Fund.⁵ The fund's main purpose is to provide compensation for damages incurred as a result of the wrongful activities of real estate licensees.⁶

While real estate licensees are subject to regulatory legislation in every state and the District of Columbia,⁷ twelve states provide no additional monetary remedy to augment common law actions.⁸ However, most state legislatures recognize the need to afford greater protection to

1. See generally *Symposium—Consumer Protection*, 12 NEW ENG. L. REV. 849 (1977); *Consumer Protection Symposium*, 8 ST. MARY'S L.J. 609 (1977).

2. See, e.g., Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1976); Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE ANN. tit. 2, §§ 17.41-17.63 (Vernon Supp. 1978-1979).

3. See THE FLA. SENATE ECONOMIC, COMMUNITY & CONSUMER AFFAIRS COMM., A REVIEW OF CH. 475, FLA. STATUTES REAL ESTATE LICENSE LAW 65 (1978) [hereinafter cited as REVIEW OF FLORIDA REAL ESTATE LICENSE LAW]; Levine, *Real Estate Recovery Funds—Public Protection Against Broker Malpractice*, 5 REAL EST. L.J. 166 (1976); Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978); Comment, *The Real Estate Broker Purchaser Relationship: Louisiana and Common Law*, 52 TUL. L. REV. 157, 169-70 (1977); Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1343-44 (1972). See also Epley & Armbrust, *Legal Limitations on Real Estate Prelicensing Requirements*, 7 REAL EST. L.J. 15 (1978).

4. The Real Estate Brokers and Salesmen License Act, ILL. REV. STAT. ch. 111, §§ 5701-5743, 5701 (1977 & Supp. 1978) (repealing the licensing act of 1921).

5. *Id.* §§ 5716-5725 (previously codified at ILL. REV. STAT. ch. 114 1/2, §§ 108.1-108.10 (1975)).

6. *Id.* § 5716 (1977). See note 42 and accompanying text *infra*. Also, a recovery fund may foster increased public confidence in the real estate industry. Duty, *Real Estate Licensee Recovery Fund, the California Experience*, 7 BEVERLY HILLS B.J. 13, 14 (May-June 1973) [hereinafter cited as *Duty*].

7. See REVIEW OF FLORIDA REAL ESTATE LICENSE LAW, *supra* note 3, at 139-45.

8. Real Estate Broker & Salesperson Act, Pub. L. No. 248, H.B. No. 1715 (1979) (to be codified at IND. CODE §§ 25-34.1-1-1 to 25-34.1-6-2) (eff. date Dec. 31, 1979); IOWA CODE ANN. §§ 117.1-117.53 (West Supp. 1979-1980); ME. REV. STAT. ANN. tit. 32, §§ 4001-4119 (1964 & Supp. 1978); MO. REV. STAT. § 339 (1966 & Supp. 1979); NEB. REV. STAT. §§ 81-885.01 to 81-885.48 (Cumm. Supp. 1978); N.H. REV. STAT. ANN. § 331A (1966 & Supp. 1977); N.Y. REAL PROP. LAW §§ 440-442 (McKinney 1968 & Supp. 1978-1979); N.C. GEN. STAT. § 93A (1975 & Cumm. Supp. 1977); PA. STAT. ANN. tit. 63, §§ 431-448 (Purdon 1968 & Supp. 1979-1980); S.C.

the public. Twelve states and the District of Columbia require some or all licensed real estate practitioners to post a surety bond with the licensing agency.⁹ The bond is used to reimburse aggrieved persons in the event that a judgment is recovered against the licensee.¹⁰ Twenty-six states have enacted statutes which provide for real estate recovery funds.¹¹

Prior to the introduction of the real estate recovery fund concept by the Arizona legislature in 1963,¹² the surety bond was the principal regulatory protection against a licensee's wrongful conduct. A majority of states have adopted the recovery fund remedy, while many of them have abandoned the surety bond remedy.¹³ Several factors account for

CODE §§ 40-57-10 to 40-57-240 (1976 & Supp. 1978); VT. STAT. ANN. tit. 26, §§ 2211-2301 (1975 & Supp. 1979); WIS. STAT. ANN. §§ 452.01-452.20 (West 1974 & Supp. 1979-1980).

9. ALA. CODE § 34-27-31c, d (1975) (brokers \$8,000, salespersons \$6,000); D.C. CODE § 1405 (1973 & Supp. 1978) (brokers \$2,500, salespersons \$1,000); LA. REV. STAT. § 37:1447 (West 1974) (\$5,000); MASS. GEN. LAWS ANN. ch. 112, § 87TT (West Supp. 1979) (\$1,000); MICH. COMP. LAWS ANN. § 451.215a (Supp. 1979-1980) (discretionary maximum of \$5,000 if applicant's license was revoked previously); MISS. CODE ANN. § 73-35-29 (Supp. 1978) (set by regulatory agency); MONT. REV. CODES ANN. § 66-1933 (Supp. 1977) (\$10,000); N.M. STAT. ANN. § 67-24-28A (1974) (\$1,500); OR. REV. STAT. § 696.525 (1977) (escrow agents \$25,000); TENN. CODE ANN. § 62-1319 (1976) (brokers \$10,000, salespersons \$2,500); WASH. REV. CODE ANN. § 18.85.300 (1978) (brokers \$5,000, salespersons \$1,000); W. VA. CODE § 47-12-6 (1976) (non-residents \$2,000); WYO. STAT. § 33-28-107(c) (1977) (\$1,000).

10. See, e.g., MONT. REV. CODES ANN. § 66-1933 (Supp. 1977). See generally Annot., 17 A.L.R.2d 1012 (1951).

11. ALASKA STAT. §§ 45.85.010-45.85.110 (Supp. 1978); ARIZ. REV. STAT. ANN. §§ 32-2186 to 32-2193 (1976 & Supp. 1978-1979) (scheduled for review in 1981 under sunset law, *id.* §§ 41-2351, 41-2354 & 41-2362 (Supp. 1978-1979)); ARK. STAT. ANN. §§ 71-1307 to 71-1325 (Interim Supp. 1979); CAL. BUS. & PROF. CODE §§ 10470-10483 (West 1964 & Supp. 1979); COLO. REV. STAT. §§ 12-61-301 to 12-61-305 (1978); CONN. GEN. STAT. ANN. § 20-324 (West Supp. 1979); DEL. CODE ANN. tit. 24, § 2921 (Supp. 1978); FLA. STAT. ANN. §§ 475.481-475.486 (West Supp. 1979); GA. CODE ANN. § 84-1424 (1979); HAW. REV. STAT. §§ 467-16 to 467-25 (1976 & Supp. 1978); IDAHO CODE § 54-2035 (1979); ILL. REV. STAT. ch. 111, §§ 5716-5725 (1977 & Supp. 1978); KAN. STAT. ANN. §§ 58-3023 to 58-3033 (1976); KY. REV. STAT. §§ 324.400-324.420 (1977 & Supp. 1978); MD. CODE ANN. art. 56, § 217A (1972 & Supp. 1979); MINN. STAT. ANN. § 82.34 (West Supp. 1979); NEV. REV. STAT. §§ 645.841-645.850 (1977); N.J. STAT. ANN. §§ 45:15-34 to 45:15-42 (West 1978); N.D. CENT. CODE §§ 43-23.2-01 to 43-23.2-13 (1978); OHIO REV. CODE ANN. § 4735.12 (Page Supp. 1978); OKLA. STAT. ANN. tit. 59, §§ 858-601 to 858-605 (West Supp. 1978-1979); R.I. GEN. LAWS § 5-20.5-5 (Supp. 1978); S.D. COMPILED LAWS ANN. §§ 36-21-55 to 36-21-71 (1977); TEX. REV. CIV. STAT. ANN. tit. 113A, art. 6573a, § 8 (Vernon Supp. 1978-1979); UTAH CODE ANN. §§ 61-2a-1 to 61-2a-12 (1978); VA. CODE §§ 54-765.1 to 54-765.9 (1978).

Refer to notes 107-114 *infra* for cases that have construed and applied several of the recovery fund statutes.

12. Real Estate Recovery Fund Act, Laws 1963, ch. 42, § 1 (codified at ARIZ. REV. STAT. ANN. §§ 32-2186 to 32-2193 (1976 & Supp. 1979-1980)). For a brief history of the real estate recovery fund concept and its relationship to a fund which originated in England for the compensation of loss to the public due to the dishonesty of an attorney, see Duty, *supra* note 6, at 14.

13. E.g., ARK. STAT. ANN. § 71-1305(c) (Supp. 1975) (repealed Dec. 31, 1979 by Act of Feb. 7, 1979, No. 73 § 8, 1979 Ark. Acts). The Arkansas General Assembly determined that since an emergency existed, the recovery fund should be effective upon its enactment:

[T]he current methods of bonding real estate brokers and salesmen are ineffective to secure appropriate relief to victims of unethical and unscrupulous brokers and salesmen, and that this Act is immediately necessary in order to remedy such situation. An emer-

the change. Not all licensees are bondable, as some are perceived by surety companies to be bad risks. In many of the states which use the bond remedy, the required amount of surety coverage is insufficient because the cost to the licensee of obtaining adequate protection is substantial.¹⁴ In contrast, all real estate licensees are subject to the provisions of the recovery fund statutes, including the mandatory contribution of a portion of licensing fees.¹⁵ While most recovery funds allow for substantial compensation, the cost of maintaining these funds has been minimized.¹⁶ The recovery fund remedy may, in some cases, reduce the amount of time a claimant must wait before obtaining compensation.¹⁷ In short, the recovery funds provide greater monetary coverage to the public and include within their coverage more licensees than most surety bond provisions.¹⁸

This note will evaluate the strengths and weaknesses of the Illinois Real Estate Recovery Fund by examining the experience of other states with similar funds. First, the provisions of the Illinois fund will be summarized. Next, this note will assess the constitutionality of the Illinois statute with respect to the penalties and disabilities which it imposes upon licensees. Also, this note will consider the practicality of

agency is therefore declared to exist and this Act, being necessary for the preservation of the public peace, health, welfare, and safety, shall be effective from and after its passage and approval.

Id. § 10, reprinted in ARK. STAT. ANN. § 71-1305 (Interim Supp. 1979) (annotation). *Contra*, MASS. H. NO. 250 (1979) (which would have established a real estate recovery fund, but was rejected). In theory, a recovery fund could be used to supplement bonding requirements; the Massachusetts bill provided that the bond should be retained and its amount increased. *Id.* § 2. In practice, as the Arkansas example illustrates, enacted recovery funds have displaced bonding methods.

14. *See* Duty, *supra* note 6, at 14. Duty noted that a broker's surety coverage often is dropped after the first claim. *Id.* If the maximum liability under the bond has been discharged in the payment of other claims, recovery is precluded. *Johnson v. Safeco Ins. Co.*, 576 S.W.2d 220, 222 (Ark. 1979). *See* note 9 *supra* for the minimum bond required by the states which utilize this remedy. In 1973, it was estimated that it would cost more than \$60 annually to purchase a \$10,000 surety bond. Duty, *supra* note 6, at 14.

15. *E.g.*, ILL. REV. STAT. ch. 111, §§ 5716, 5717 (1977); MINN. STAT. ANN. § 82.34 subd. 3, 4 (West Supp. 1979).

16. *E.g.*, ILL. REV. STAT. ch. 111, § 5716 (1977) (\$10,000); R.I. GEN. LAWS § 5-20.5-5(a) (Supp. 1978) (\$20,000). *But see* IDAHO CODE § 54-2035B (1979), which permits a maximum recovery of only \$2,000 per licensee per calendar year.

In Illinois, for example, when a real estate broker applies for an original certificate of registration, he pays \$10 of his total licensing fees into the recovery fund. ILL. REV. STAT. ch. 111, §§ 5716, 5729 (1977). If the balance remaining in the fund at the end of the year falls below \$150,000, he is assessed an additional \$10 (\$5 for salesmen) when his license is renewed. *Id.* § 5717. In California, it was estimated that it would cost a real estate licensee approximately 94¢ per year (63¢ per year for salesmen) in payments to the recovery fund "for that which is comparable to fidelity coverage of \$10,000/\$20,000." Duty, *supra* note 6, at 15.

17. *Twenty-Second Annual Survey of Developments in Virginia Law, 1976-1977*, 63 VA. L. REV. 1350, 1476 (1977).

18. *See Utah Legislative Survey—1975*, 1975 UTAH L. REV. 790, 815.

the proceedings which determine the liability of the Illinois fund, and the reasonableness of the limitation of the fund's liability for the activities of any single licensee. Finally, procedural changes in Illinois' Real Estate Recovery Fund will be proposed.

PROVISIONS OF THE ILLINOIS REAL ESTATE RECOVERY FUND

Illinois' Real Estate Recovery Fund is designed to provide payment to persons who have obtained valid but unsatisfied judgments against licensed real estate brokers.¹⁹ The cause of action must have arisen from the broker's professional activities.²⁰ The judgment must be based "upon the grounds of fraud, misrepresentation or deceit, which occurred on or after January 1, 1974."²¹ Recovery from the fund is limited to actual cash damages incurred;²² losses in market value and any punitive damages awarded against the broker may not be reimbursed from the fund. Costs of suit and attorney's fees may be reimbursed by the fund up to fifteen percent of the amount of actual damages awarded.²³ The maximum payment from the recovery fund

19. ILL. REV. STAT. ch. 111, § 5718(b) (1977). *Accord*, CAL. BUS. & PROF. CODE § 10471 (Supp. 1979). The judgment debtor must be licensed when the injurious act occurs. *In re Marriage of Powers*, 96 Cal. App. 3d 440, 158 Cal. Rptr. 92, 96 (1979).

For purposes of this note the terms "real estate broker" or "broker" when used in reference to the Illinois statute include any "real estate broker," "real estate broker-salesman," "real estate salesman" or "unlicensed employee of a real estate broker." These categories are within the ambit of the Illinois recovery fund. ILL. REV. STAT. ch. 111, § 5716 (1977).

20. *Id.* See note 108 and accompanying text *infra*.

21. ILL. REV. STAT. ch. 111, § 5718(b) (1977). However, section 5716 describes more generally the range of activities for which recovery is possible, including "an act, representation, transaction or conduct" of a broker which is in violation of the licensing act or regulations promulgated by the licensing agency. For example, a broker or his agent may neglect to place a buyer's earnest money deposit in an escrow fund in violation of the regulations. ILLINOIS DEPT. OF REGISTRATION & EDUC., RULES & REGULATIONS PROMULGATED FOR THE ADMINISTRATION OF THE REAL ESTATE BROKERS & SALESMEN LICENSE ACT § IV (1977). Whether the buyer could recover from the fund if the broker went bankrupt is open to dispute as any judgment obtained would not be based on fraud, misrepresentation or deceit. While payment from most similar funds is limited to these grounds, negligence is included expressly as grounds for recovery from the Colorado fund. COLO. REV. STAT. § 12-61-302(1) (1978).

As of January 1, 1979, the Illinois Department of Registration reported that it had received notice of five suits out of 163 which were not based on any of the requisite grounds for recovery. Real Estate Recovery Status Report as of Jan. 1, 1979, at 1-2 (unpublished report of the Illinois Department of Registration and Education on file at the Chicago-Kent Law Review) [hereinafter cited as Status Report].

22. ILL. REV. STAT. ch. 111, § 5716 (1977).

23. *Id.* On its face, the statute does not specify whether the term "actual damages" refers to the amount of actual damages awarded against the judgment debtor, or the amount of actual damages awarded from the recovery fund. One circuit court initially approved the former interpretation. *McDonald v. Eich*, No. W77-G-2984 CH (12th Jud. Cir. June 20, 1979) (judgment order against the fund). The Illinois Department of Registration and Education filed a motion for rehearing on the amount of attorney's fees awarded. *Id.* (12th Jud. Cir. July 20, 1979). Subsequently, the court adopted the latter interpretation of "actual damages." *Id.* (12th Jud. Cir. Sept. 4, 1979), *appeal docketed*, No. 79-844 (Ill. App. Ct. 4th Dist. Sept. 28, 1979). The lower court's

in connection with an act or transaction involving a real estate broker is \$10,000.²⁴ The maximum liability of the fund arising from the activities of any single broker is limited to \$50,000.²⁵

The Illinois Department of Registration and Education²⁶ is the statutory agency charged with the maintenance of the recovery fund.²⁷ The statute provides that the DRE must receive written notice at the "commencement" of a lawsuit which may result in recovery from the fund.²⁸ The action against the broker must be initiated within two years from the accrual of the cause of action.²⁹ After the DRE is notified of the suit it may enter an appearance,³⁰ or intervene and fully participate in the action brought against the broker.³¹

When judgment is entered against a real estate broker the judgment creditor may file, upon the termination of all proceedings in connection with that judgment, a verified claim for payment from the fund in the court in which judgment was entered. The claimant must show that he has satisfied certain conditions including affirmations that (1) he is not a spouse of the debtor; (2) a judgment has been obtained in a stated amount and is still due; (3) a reasonable search has been made for the debtor's assets; (4) assets were not found in an amount sufficient to satisfy the judgment; and, (5) the claimant has diligently pursued his

initial interpretation of the statute allowed unlimited recovery of attorney's fees and overlooked the legislature's intention to place limits on recovery to ensure the financial integrity of the fund. See text accompanying notes 24 and 25 *infra*.

The statute also is vague as to whether attorney's fees and court costs are both included within the 15% limitation. Although this issue has not been litigated at the appellate level, in *Jones v. Anderson*, 62 Ill. App. 3d 284, 379 N.E.2d 104 (1978), the appellate court affirmed an order requiring the Illinois Department of Registration and Education to pay plaintiffs \$11,543.32 which included a \$10,000 judgment amount, \$1,500 for attorney's fees and \$43.32 for court costs. *Id.* at 287, 379 N.E.2d at 105.

24. ILL. REV. STAT. ch. 111, § 5716 (1977). See note 155 *infra*.

25. *Id.* As of January 1, 1979, this provision mandated the denial of three claims arising from the activities of the only broker whose \$50,000 limit had been reached. Status Report, *supra* note 21, at 2. See text accompanying notes 156-67 *infra*.

26. Hereinafter referred to in text and footnotes as the DRE.

27. ILL. REV. STAT. ch. 111, § 5716 (1977).

28. *Id.* § 5718(a). The DRE, on occasion, has disputed whether notice was timely. As of January 1, 1979, the DRE reported that of 163 cases it had received, notice in 58 of those cases was received more than 30 days after the cases were filed. Status Report, *supra* note 21, at 2. Trial courts have been reluctant to dismiss petitions for recovery on this basis unless the DRE can show that the delay affected its ability to defend the fund. See, e.g., *Harris v. Barnes*, No. 76M1-134925 (Cook County Cir. Ct. Oct. 5, 1977) (order for payment from the fund granted).

29. ILL. REV. STAT. ch. 111, § 5718(a) (1977). The DRE reported that as of January 1, 1979, it had received notice of six suits out of 163 which were begun more than two years from the accrual of the cause of action therein. Status Report, *supra* note 21, at 2.

30. ILL. REV. STAT. ch. 111, § 5721 (1977).

31. *Id.* § 5718(a). See generally *Ryan v. Bening*, 66 Ill. App. 3d 127, 127, 383 N.E.2d 681, 682 (1978).

remedies against the judgment debtor.³²

When the DRE is directed by the court to make payment from the recovery fund, the department is subrogated to all of the rights of the judgment creditor as against the judgment debtor. The judgment creditor must assign his entire interest in the judgment to the DRE. Any amount recovered by the DRE on the assignment of judgment must be deposited in the recovery fund.³³ The failure of a claimant to comply with the provisions of the recovery fund statute constitutes a waiver of all rights to reimbursement.³⁴

A real estate broker's license is terminated automatically if the DRE pays any amount from the recovery fund in settlement of a claim or in satisfaction of a judgment against a broker.³⁵ The broker is not eligible to receive a new license until he has repaid, with interest, the amount disbursed from the fund.³⁶ A discharge of the broker's debts in bankruptcy does not alter this requirement.³⁷

The Illinois General Assembly amended the recovery fund statute in 1978 to allow substituted service of process upon the director of the DRE in situations where a real estate broker cannot be found to effect service.³⁸ The substituted service amendment specifies that "[a]ny judgment obtained after service of process on the Director shall apply to and be enforceable against the Real Estate Recovery Fund only."³⁹ This legislation was proposed in the wake of an Illinois appellate court decision which held that a judgment creditor could not recover from the fund since personal service had not been obtained at trial over a broker who had fled Illinois.⁴⁰ The appellate court stated that there was nothing in the original statute creating the recovery fund "to suggest a departure from the principle that personal service is necessary for the court to acquire [in personam] jurisdiction over the defendant [bro-

32. ILL. REV. STAT. ch. 111, § 5718(b) (1977).

33. *Id.* § 5722. As of July 11, 1979, 56 claims had been paid from the fund, including the payment of seven claims in 1979, in the total amount of \$237,985.61. Status Report, *supra* note 21, at 1 (revised through July 11, 1979).

34. ILL. REV. STAT. ch. 111, § 5723 (1977).

35. *Id.* § 5718(d). See text accompanying notes 42-86 *infra*. As of January 1, 1979, the licenses of twenty brokers had been terminated as a result of payments from the fund. Status Report, *supra* note 21, at 2.

36. ILL. REV. STAT. ch. 111, § 5718(d) (1977). One broker has agreed to make restitution to the fund. Status Report, *supra* note 21, at 2-3.

37. ILL. REV. STAT. ch. 111, § 5718(d) (1977). But see text accompanying notes 87-106 *infra*.

38. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978).

39. *Id.* Accord, COLO. REV. STAT. § 12-61-303(3) (1978). But see text accompanying notes 75-86 *infra*, which discusses the DRE's position that this clause does not preclude it from automatically terminating the license of a broker when substituted service is used by a judgment creditor to effect recovery from the fund.

40. *Chiarelli v. Mitchell*, 36 Ill. App. 3d 287, 343 N.E.2d 563 (1976).

ker]."⁴¹

CONSTITUTIONALITY OF PENALTIES AND DISABILITIES IMPOSED UPON REAL ESTATE BROKERS

The various recovery funds share a common purpose—to reimburse the public for damages incurred as a result of the wrongful acts of "unscrupulous or financially unstable brokers or salesmen".⁴² However, due to their regulatory nature, almost all of these funds require that disciplinary action be taken against the licensee whose activities are the basis of a claim which results in payment from the fund.⁴³ While the states undoubtedly have the power to sanction licensees, the statutory disciplinary provisions present problems of constitutional dimension.

Due Process and Automatic License Revocation

In *Slaughter v. Edwards*,⁴⁴ the California Court of Appeal considered an appeal by a defendant real estate broker of an order granting the judgment creditors' application for payment of a prior judgment against the defendant broker out of California's real estate recovery fund.⁴⁵ The broker appealed the order because payment from the fund resulted in the automatic suspension of his license.⁴⁶ None of the pertinent statutes provided that the broker be made a party to the proceeding which determined whether the judgment creditor would recover from the fund.⁴⁷ The appellate court in *Slaughter* found that the broker was an "aggrieved party" who had proper standing to bring the appeal since his interest in maintaining his license was apparent from

41. *Id.* at 289, 343 N.E.2d at 565.

42. *Chetelat v. District Court*, 586 P.2d 1335, 1337 (Colo. 1978). *E.g.*, S.D. COMPILED LAWS ANN. § 36-21-55 (1977), which states, in pertinent part:

The state real estate commission is hereby directed to establish and maintain a real estate recovery fund, which shall be used to provide a source for payment of unsatisfied judgments obtained by persons aggrieved by the acts of a [licensed] broker or salesman.

Some recovery funds also are designed to assist the real estate profession by providing revenue for education and research purposes. *E.g.*, UTAH CODE ANN. § 61-2a-2(2) (1978).

43. *E.g.*, CAL. BUS. & PROF. CODE § 10475 (West Supp. 1979); ILL. REV. STAT. ch. 111, § 5718(d) (1977). UTAH CODE ANN. § 61-2a-9 (1978), provides that the Utah Real Estate Division has the discretion to "revoke, suspend or refuse to renew the license" of the licensee. ALASKA STAT. §§ 45.85.010-45.85.110 (Supp. 1978), does not mandate that disciplinary action be taken against the licensee. However, such action may be taken under the general disciplinary powers of the Alaska Real Estate Commission. *Id.* § 45.85.110.

44. 11 Cal. App. 3d 285, 90 Cal. Rptr. 144 (1970).

45. *Id.* at 288, 90 Cal. Rptr. at 146-47.

46. CAL. BUS. & PROF. CODE § 10475 (West Supp. 1979).

47. *Id.* at §§ 10470-10483 (1964 & Supp. 1979). Section 10471 provided only that the real estate commissioner be served with a copy of a claimant's verified application for recovery.

the trial court record.⁴⁸

On its own motion, the California Court of Appeal raised the issue of the constitutionality of the proceedings.⁴⁹ The court questioned whether the real estate broker was deprived of procedural due process since he was not given notice or an opportunity to be heard at the post-trial hearing, despite the fact that his license was suspended automatically when the judgment creditor obtained a court order for payment from the fund.⁵⁰ The *Slaughter* opinion did not mention the basis for the court's implicit determination that the broker was entitled to the protections of procedural due process.⁵¹ Rather, the court focused upon whether the provisions of California's recovery fund comported with the process that was due the broker.⁵²

The real estate commissioner contended that the broker's constitutional rights were not prejudiced because the broker participated in the post-trial hearing which resulted in the payout from the fund. The appellate court found, however, that although the broker testified as a witness for the commissioner, he did not appear as a party pursuant to notice.⁵³

The judgment creditors filed a brief in order to defend the payment order they received from the lower court. Their argument was that the revocation of the broker's license resulted from ministerial rather than judicial or quasi-judicial action. In other words, the creditors contended that the payout order made suspension of the broker's license mandatory as a matter of law.⁵⁴ The court compared the instant situation to the mandatory duty of the commissioner to suspend a broker when he is convicted of a crime.⁵⁵ The *Slaughter* court noted that

48. 11 Cal. App. 3d at 290-92, 90 Cal. Rptr. at 148-49. The judgment creditors were "necessary parties" to the appeal because the validity of the payment made to them by the California Commissioner of Real Estate would be in question if the broker was successful in reversing the order for payment from the fund. *Id.* at 292, 90 Cal. Rptr. at 149.

49. *Id.* at 293, 90 Cal. Rptr. at 150.

50. *Id.*

51. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the United States Supreme Court outlined a two-part test for determining whether an individual is entitled to procedural due process. First, the court must decide whether there has been a deprivation of a liberty interest or a property interest vested by state law. *Id.* at 569-72. Second, if such an interest is found, the court must then decide what process is due. *Id.* at 569-70 & n.7. The *Slaughter* court, in its discussion of standing, stated that "[t]here can be no question that defendant's license is recognized as a valuable and vested property right." 11 Cal. App. 3d at 291-92, 90 Cal. Rptr. at 149.

52. *Id.* at 293, 90 Cal. Rptr. at 150.

53. *Id.*

54. *Id.*

55. *Id.* at 294, 90 Cal. Rptr. at 150. CAL. BUS. & PROF. CODE § 10177 (West Supp. 1979), provides that a license may be revoked when the licensee is convicted of a felony or a crime that involves moral turpitude.

the reason due process is satisfied in such a situation is because the broker has an opportunity to defend himself at trial and upon conviction of the crime.⁵⁶ However, the court observed that where an independent judicial or quasi-judicial determination of facts occurs, a broker's license may not be suspended or revoked without granting a hearing to the broker.⁵⁷ The court examined the California statute and made the following findings:

[T]he suspension of the license is not made mandatory upon the rendition of the judgment against the licensee. . . . The court in the . . . [post-trial] proceeding makes an independent determination as to whether the judgment is one obtained on the grounds of fraud, misrepresentation, or deceit with reference to a transaction for which a real estate license was required. . . . This determination is the event upon which the licensee's license is automatically suspended. Yet, the licensee . . . is not permitted to show that the claim is one which may not properly be levied against the Fund.⁵⁸

The *Slaughter* court concluded that the defendant broker was denied due process and held that the statutory provision requiring automatic suspension of the broker's license was unconstitutional.⁵⁹ The California legislature subsequently amended the statute to provide for notice to licensees and an opportunity to defend at the collateral hearing when a verified application for recovery from the fund is filed.⁶⁰

The California Court of Appeal is unique in that no other state court of review has considered the constitutionality of any aspect of its state's recovery fund. The recovery fund statutes of many states provide no opportunity for a licensee to appear at the proceeding which determines whether recovery from the fund will occur.⁶¹ Several states have followed California's lead and now require that the licensee receive notice and an opportunity to defend himself at the post-trial hearing.⁶² Other states condition any action taken against a licensee upon a

56. 11 Cal. App. 3d at 294, 90 Cal. Rptr. at 150.

57. *Id.*, 90 Cal. Rptr. at 151.

58. *Id.* at 295, 90 Cal. Rptr. at 150-51.

59. *Id.*, 90 Cal. Rptr. at 151-52.

60. CAL. BUS. & PROF. CODE §§ 10471, 10473.1 (West Supp. 1979).

61. ARIZ. REV. STAT. ANN. §§ 32-2186 to 32-2193 (1976 & Supp. 1979-1980); CONN. GEN. STAT. ANN. § 20-324 (West Supp. 1979); DEL. CODE ANN. tit. 24, § 2921 (Supp. 1978); FLA. STAT. ANN. §§ 475.481-475.486 (West Supp. 1979); GA. CODE ANN. § 84-1424 (1979); HAW. REV. STAT. §§ 467-16 to 467-25 (1976 & Supp. 1978); IDAHO CODE § 54-2035 (1979); KAN. STAT. ANN. §§ 58-3023 to 58-3033 (1976); NEV. REV. STAT. §§ 645.841-645.8494 (1977); N.J. STAT. ANN. §§ 45:15-34 to 45:15-42 (West 1978); OHIO REV. CODE ANN. § 4735.12 (Page Supp. 1978); OKLA. STAT. ANN. tit. 59, §§ 858-601 to 858-605 (West Supp. 1978-1979); R.I. GEN. LAWS § 5-20.5-5 (Supp. 1978); TEX. REV. CIV. STAT. ANN. tit. 113A, art. 6573a, § 8 (Vernon Supp. 1978-1979); UTAH CODE ANN. §§ 61-2a-1 to 61-2a-12 (1978).

62. COLO. REV. STAT. § 12-61-304 (1978); MINN. STAT. ANN. § 82.34 subd. 10 (West Supp. 1979); N.D. CENT. CODE § 43-23.2-06 (1978); S.D. COMPILED LAWS ANN. § 36-21-64 (1977).

finding of misconduct by the agency in charge of regulating the real estate profession.⁶³

Under Illinois decisional and statutory law, a real estate broker is entitled to procedural due process prior to license suspension or revocation.⁶⁴ An Illinois appellate court has explained that a person who possesses "a real estate broker's license is entitled to . . . 'due process of law [which] requires a definite charge, adequate notice, and a full, fair and impartial hearing.'"⁶⁵

Unlike the statute declared unconstitutional in California, the Illinois recovery fund statute entitles the broker to notice from the judgment creditor when an application is made for recovery.⁶⁶ This provision affords the broker an opportunity to satisfy the judgment and avoid a payment from the fund which would have the effect of revoking his license. Also, notice of the post-trial hearing gives the broker a chance to file a motion to participate in this proceeding, although no provision is made for this procedure in the recovery fund statute.⁶⁷

California's recovery fund statute has provided from its inception that any judgment obtained against a licensee is *prima facie* evidence only, of the fund's liability.⁶⁸ In Illinois, the grounds underlying a judgment against a broker, in all likelihood, cannot be attacked at the post-trial hearing which determines the fund's liability.⁶⁹ In this respect, the termination of a broker's license is automatic since it is not based upon an independent determination of the facts underlying the judgment. It can be argued that the broker receives the process due him on the merits of his license revocation in an impartial hearing at the trial establishing his liability to the judgment creditor. Also, when the DRE makes payment from the fund, it notifies the broker that he has ten days to show cause why his license should not be terminated.⁷⁰

63. ARK. STAT. ANN. § 71-1321 (Interim Supp. 1979); KY. REV. STAT. § 324.420(1) (1977); MD. CODE ANN. art. 56, § 217A (1972).

64. *Saleson v. Department of Reg. & Educ.*, 95 Ill. App. 2d 104, 117, 237 N.E.2d 822, 828 (1968); ILL. REV. STAT. ch. 111, § 5733 (1977). See also *Ullmen v. Department of Reg. & Educ.*, 67 Ill. App. 3d 519, 385 N.E.2d 58 (1978), and *Coles v. Department of Reg. & Educ.*, 59 Ill. App. 3d 1046, 376 N.E.2d 269 (1978). In both *Ullmen* and *Coles*, the appellate court assumed that a real estate broker who is faced with license revocation proceedings is entitled to due process.

65. *Saleson v. Department of Reg. & Educ.*, 95 Ill. App. 2d 104, 117, 237 N.E.2d 822, 828 (1968), quoting *Smith v. Department of Reg. & Educ.*, 412 Ill. 332, 344, 106 N.E.2d 722, 728 (1952).

66. ILL. REV. STAT. ch. 111, § 5718(b) (1977).

67. The motion might be premised on the theory that the broker is a necessary party to the proceedings. ILL. REV. STAT. ch. 110, § 26 (1977).

68. CAL. BUS. & PROF. CODE § 10473 (West Supp. 1979).

69. ILL. REV. STAT. ch. 111, § 5718(b) (1977). See text accompanying notes 115-54 *infra*.

70. Letter from Henry Arkin, Technical Advisor for the DRE, to author (Sept. 11, 1979).

On the other hand, as the California Court of Appeal noted in *Slaughter*, the direct effect of a judgment against a licensee is the imposition of monetary damages only.⁷¹ The same holds true for the Illinois fund. The license of an Illinois broker is not revoked until after his judgment creditor has been successful in receiving an order for payment from the fund.⁷² Recovery from the fund is by no means automatic. If the judgment creditor cannot or will not comply with all of the provisions of Illinois' fund, his application for recovery will be denied.⁷³ A broker *always* is entitled to an opportunity for a hearing conducted by the DRE on the issue of license revocation, *except* when termination is based upon a payment from the fund.⁷⁴ From this perspective, a trial which establishes only a broker's monetary liability to another person does not constitute an "impartial hearing" as to whether there are grounds for revoking the broker's license.

Nevertheless, when a broker receives notice of a trial in which the plaintiff intends to establish the broker's liability in connection with his professional activities, he should not be able to ignore the suit and later claim that due process was denied to him when his license is terminated. The trial provides an opportunity for a full, fair and impartial hearing where the broker can dispute charges pertaining to his business practices. One effect of the automatic termination provision is that brokers may choose to defend such actions more often. This result promotes the legislative intent of the recovery fund and the real estate licensing statute without the sacrifice of a broker's due process rights.

However, the DRE also contends that the termination clause applies to brokers not served personally, but through substituted service.⁷⁵ The department maintains that the statutory clause which specifies that "[a]ny judgment obtained after service of process on the Director shall apply to and be enforceable against the Real Estate Recovery Fund only,"⁷⁶ means only that the broker is not liable to the judgment credi-

(letter on file at the Chicago-Kent Law Review) [hereinafter cited as DRE Advisor]. The practice of giving notice to show cause is not required by the recovery fund statute.

71. 11 Cal. App. 3d at 292, 90 Cal. Rptr. at 149. The court noted that a broker might have a variety of reasons for not contesting a judgment. *Id.*

72. ILL. REV. STAT. ch. 111, § 5718(d) (1977).

73. *Id.* §§ 5718, 5723.

74. *Id.* §§ 5732, 5733(c). The *Slaughter* court observed that under California statutory law, a broker was entitled to a hearing if disciplinary proceedings were brought, except when recovery from the fund was involved. 11 Cal. App. 3d at 294-95, 90 Cal. Rptr. at 151.

75. DRE Advisor, *supra* note 70.

76. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978). The substituted service provision was introduced in the Illinois Senate without this clause which was added by a Senate amendment. The present wording of the clause is the result of an amendatory veto by the Governor which was

tor for the judgment amount.⁷⁷ The DRE's interpretation of the statute is incorrect. When a broker's license is terminated because of a payment from the fund, he cannot obtain another license until he reimburses the fund for the amount paid to the judgment creditor.⁷⁸ Yet, if this provision is enforced against a broker when the substituted service method is used, the specific intent of the legislature that such a judgment must "apply to and be enforceable against the recovery fund only" is contravened.

Assuming the DRE is correct in its interpretation of the substituted service provision, the statute violates constitutional protections of due process. The broker is entitled to notice of the proceeding which results in the termination of his license.⁷⁹ The United States Supreme Court has held that this notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁸⁰

The recovery fund statute requires the DRE to send a copy of the substituted process which is served on the director of the DRE to the broker's last reported address by registered mail.⁸¹ While the department may notify a broker by registered mail when license revocation proceedings are initiated,⁸² this method is ordinarily an efficient notice-giving device.⁸³ Thus, such notification is "reasonably calculated" to alert the broker to the revocation proceeding since the broker should receive the letter of notice when it is directed to his last reported place of business.

approved by the General Assembly. ILLINOIS FINAL LEGISLATIVE SYNOPSIS & DIGEST, 1977 REG. SESS., S.B. NO. 745.

77. DRE Advisor, *supra* note 70.

78. ILL. REV. STAT. ch. 111, § 5718(d) (1977).

79. *Saleson v. Department of Reg. & Educ.*, 95 Ill. App. 2d 104, 117, 237 N.E.2d 822, 828 (1968). See also *Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280-81 (1975).

80. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

81. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978). Perhaps this is not a notice requirement, but rather a check on the plaintiff to determine whether the substituted service order was obtained properly. If the broker receives the process sent by the DRE and consequently makes an appearance in the case, then the order for substituted service probably should not have been issued. See text accompanying note 84 *infra*.

82. ILL. REV. STAT. ch. 111, § 5733(c) (1977).

83. *Stateside Mach. Co. v. Alperin*, 591 F.2d 234, 241 (3d Cir. 1979). The United States Constitution does not require that a party receive actual notice of an action. *Id.* Some suits which normally require personal service of process to satisfy the notice requirement of due process may involve circumstances which justify other less effective methods of service. *E.g.*, *International Controls Corp. v. Vesco*, 593 F.2d 166, 174-78 (2d Cir. 1979). In *Vesco*, the defendant, who resided outside the United States, hired bodyguards and took other evasive actions to avoid being served with process. The Second Circuit upheld an order permitting service by registered mail and by the deposit of the summons and complaint at the defendant's last known residential address, as these methods of service were "reasonably calculated to give Vesco actual notice of the suit." *Id.* at 178.

However, an order for substituted service may not be obtained unless the plaintiff, in the suit against the broker, persuades the court that the broker cannot be found to effect personal service.⁸⁴ When efforts to effect personal service have failed, mailing a copy of the substituted process to the broker's last reported address is unlikely to notify the broker of the suit.⁸⁵ The ineffectiveness of this notice device is significant because a broker, whose license is revoked automatically, is burdened with the repayment of a judgment debt as a prerequisite to obtaining another license. Consequently, automatic termination under the recovery fund statute involves more serious consequences than under the general revocation proceedings. Therefore, under these circumstances, due process requires that a better method of notice, such as personal service of process upon the broker, be used if the broker is to be subject to the reimbursement requirement.⁸⁶

Supremacy Clause and Discharge in Bankruptcy

A discharge in bankruptcy does not alter the Illinois recovery fund requirement that a broker is ineligible to receive another license until he has repaid with interest the amount disbursed from the recovery fund on his account.⁸⁷ However, the United States Constitution grants Congress express authority "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."⁸⁸ The United States Supreme Court has determined that states may not adopt or enforce legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁹ Consequently, insofar as the Illinois Real Estate Recovery Fund conflicts

84. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978).

85. *Cf.* *Grover v. Franks*, 27 Ill. App. 3d 900, 904, 327 N.E.2d 71, 74 (1975) (whether substituted service on party's attorney is valid against the party depends on the stage of the litigation).

86. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *People ex rel. Loeser v. Loeser*, 51 Ill. 2d 567, 572, 283 N.E.2d 884, 887 (1972); *Summers v. Illinois Commerce Comm'n*, 58 Ill. App. 3d 933, 936, 374 N.E.2d 1111, 1113 (1978); *Grover v. Franks*, 27 Ill. App. 3d 900, 903, 327 N.E.2d 71, 73 (1975).

87. ILL. REV. STAT. ch. 111, § 5718(d) (1977). *Accord*, ARIZ. REV. STAT. ANN. § 32-2188F (1976); CAL. BUS. & PROF. CODE § 10475 (West Supp. 1979); COLO. REV. STAT. § 12-61-304 (1978); CONN. GEN. STAT. ANN. § 20-324e(f) (West Supp. 1979); DEL. CODE ANN. tit. 24, § 2921(h) (Supp. 1978); FLA. STAT. ANN. § 475.484(7) (West Supp. 1979); GA. CODE ANN. § 84-1424(c)(6) (1979); HAW. REV. STAT. § 467-18(e) (1976); KAN. STAT. ANN. § 58-3028 (1976); MD. CODE ANN. art. 56, § 217A(d)(5) (1972); MINN. STAT. ANN. § 82.34 subd. 13 (West Supp. 1979); N.D. CENT. CODE § 43-23.2-09 (1978); OHIO REV. CODE ANN. § 4735.12(E) (Page Supp. 1978); R.I. GEN. LAWS § 5-20.5-5(c)(5) (Supp. 1978); S.D. COMPILED LAWS ANN. § 36-21-69 (1977); TEX. REV. CIV. STAT. ANN. tit. 113A, art. 6573a, § 8, pt. 3(f) (Vernon Supp. 1978-1979); VA. CODE § 54-7658 (1978).

88. U.S. CONST. art. 1, § 8, cl. 4.

89. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

with the purpose of any provision of the federal bankruptcy laws, the Illinois statute violates the Federal Constitution's supremacy clause⁹⁰ and to that extent is invalid.⁹¹

In *Perez v. Campbell*,⁹² the United States Supreme Court set forth the principles which are relevant to state statutes such as the one which provides for the Illinois recovery fund. *Perez* overruled two previous Supreme Court decisions,⁹³ and invalidated an Arizona statute which authorized the suspension of a driver's license and vehicle registration for nonpayment of a judgment debt resulting from an automobile accident, even when that debt had been discharged in bankruptcy proceedings.⁹⁴

The *Perez* opinion describes the appropriate analysis for determining which state statutes are in conflict with congressional bankruptcy laws: "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."⁹⁵

According to the *Perez* Court, the purpose of the Arizona statute was to protect non-negligent parties from loss brought about by financially irresponsible drivers who either admit liability or are found negligent in court.⁹⁶ In contrast, the Court noted that a primary purpose of bankruptcy is to offer a debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."⁹⁷

Arizona's financial responsibility law burdened individuals who discharged their debts in bankruptcy but were unable to obtain a new

90. U.S. CONST. art. VI, cl. 2, provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.

91. Lake, *Conflict: The Bankruptcy Act v. State Statutes*, 10 LOY. L.A.L. REV. 753, 753 (1977).

92. 402 U.S. 637 (1971).

93. *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); *Reitz v. Mealey*, 314 U.S. 33 (1941). Prior to *Perez*, a state statute was not in violation of the supremacy clause if the purpose of the state legislation did not conflict with the underlying policies of the bankruptcy laws. In *Kesler*, the Court found that a Utah motor vehicle financial responsibility law was not designed to promote debt collection, but to enforce a policy against irresponsible driving. 369 U.S. at 174. In *Reitz*, the Court found that although a New York motor vehicle financial responsibility law interfered with the effect of bankruptcy proceedings, it was constitutional since the statute was designed to promote highway safety. 314 U.S. at 37.

94. 402 U.S. at 656.

95. *Id.* at 644.

96. *Id.* at 644-48.

97. *Id.* at 648, quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

driver's license until they satisfied those discharged debts which were based upon the operation of a motor vehicle. The *Perez* Court struck down the Arizona statute because it was "inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."⁹⁸

The principles enunciated in *Perez* are applicable to all state statutes and governmental regulations which use the bankruptcy of a debtor as the basis for discriminating against him.⁹⁹ Congress has expressed its approval of this application of *Perez* by codifying the rationale of the case as part of the Bankruptcy Reform Act of 1978.¹⁰⁰ Consequently, applying the *Perez* analysis to the Illinois recovery fund provision in question is at least appropriate, if not mandatory. A bank-

98. 402 U.S. at 652. The Supreme Court of California, in *Grimes v. Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), *cert. denied*, 420 U.S. 973 (1975), observed:

[T]he *Perez* opinion made clear that the controlling principle is whether a state statute interferes with and frustrates a federal statute and not merely whether the former is designed for some conceivable state purpose. In other words, the existence *vel non* of a conflict depends on the *effect* of the state statute and cannot be determined merely by a consideration of its *purpose*.

Id. at 310, 525 P.2d at 67-68, 115 Cal. Rptr. at 627-28 (emphasis in original).

99. See *In re Crisp*, 521 F.2d 172 (2d Cir. 1975) (state hospital could not collect debt discharged in bankruptcy proceedings); *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362 (D.N.J. 1978) (state college may not withhold transcript after debt was discharged in bankruptcy proceedings); *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975) (municipal civil service board ruling resulting in a police officer's dismissal for having petitioned in bankruptcy held invalid as a violation of the supremacy clause); *Kayetan v. License No. 37589*, Class C-61, 116 Ariz. App. 99, 567 P.2d 1228 (1977) (licensing statute in conflict with federal bankruptcy law); *Grimes v. Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), *cert. denied*, 420 U.S. 973 (1975) (state may not revoke contractor's license on the sole ground of personal bankruptcy, nor may it compel the complete satisfaction of discharged debts prior to the reissuance of a license); *In re Loftin*, 327 So. 2d 543 (La. App. 1976) (Shreveport fire department policy resulting in the dismissal of a bankrupt fireman held unconstitutional under supremacy clause). *Cf.* *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977) (private college may constitutionally withhold transcript from bankrupt until debt owed to the college is paid); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*Perez* inapplicable to private action). But see *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1366 n.6 (D.N.J. 1978), in which the court takes issue with the Eighth Circuit's holding in *Girardier* for drawing a constitutional distinction between state and private colleges.

100. Pub. L. No. 95-598, 92 Stat. 2549-2657, 2593 (1978) (to be codified at 11 U.S.C. §§ 1-151326, § 525) (eff. date Oct. 1, 1979). Section 525 provides in pertinent part:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . [of] a person that is or has been a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor . . . has not paid a debt . . . that was discharged under the Bankruptcy Act.

The Senate Report states that "[t]his section permits further development to prohibit actions by governmental . . . organizations that perform licensing functions." S. REP. NO. 989, 95th Cong., 2d Sess. 81, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5867. However, the House Report notes that this section "does not prohibit consideration of other factors, such as future financial responsibility or ability." H.R. REP. NO. 595, 95th Cong., 2d Sess. 366-67, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6322-23. *Cf. In re Gahan*, 279 N.W.2d 826, 831 (Minn. 1979) (federal law does not preclude bar examiners from evaluating the responsibility of a bankrupt law applicant in satisfying his financial obligations) (decided prior to the effective date of new bankruptcy act).

rupt's failure to make repayment of a discharged debt to the Illinois fund may be the sole basis for his ineligibility to receive another broker's license.¹⁰¹ While the apparent purpose of this requirement is to promote the reimbursement of the fund by the bankrupt, it frustrates the bankrupt's ability to obtain a fresh start, as he is not eligible to work as a licensed broker until the fund is repaid.¹⁰²

Nevertheless, judgment debts based upon fraud, misrepresentation or deceit, the grounds for recovery from the Illinois fund, are not dischargeable in bankruptcy proceedings.¹⁰³ The Supreme Court recently explained the legislative basis for limiting the relief available to a dishonest bankrupt: "By seeking discharge, . . . [the debtor] placed the rectitude of his prior dealings squarely in issue."¹⁰⁴ Therefore, a bankrupt ex-broker who is indebted to the recovery fund would not be entitled to a fresh start. In 1970, however, Congress invested exclusive jurisdiction in the bankruptcy court to determine whether a debt was in this nondischargeable category. Unless a creditor with notice of the bankruptcy files a timely application in bankruptcy court "for a determination of dischargeability . . . the debt shall be discharged."¹⁰⁵

The Illinois recovery fund provision giving no effect to the broker's discharge is not in compliance with the 1970 congressional amendment because neither the judgment creditor nor the DRE is required to contest the discharge in bankruptcy court. The recovery fund statute conflicts with the federal policy of adjudicating the status of all alleged fraudulent debts in one forum, the bankruptcy court. Clearly, this provision is invalid under the supremacy clause of the Federal

101. ILL. REV. STAT. ch. 111, § 5718(d) (1977).

102. See *Grimes v. Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), *cert. denied*, 420 U.S. 973 (1975), *overruling* *Tracy v. Contractors' State Licensing Bd.*, 63 Cal. 2d 598, 407 P.2d 865, 47 Cal. Rptr. 561 (1965). *Grimes* held, *inter alia*, that a state may not compel the satisfaction of discharged debts prior to the reissuance of a contractor's license; *accord*, *Kayeton v. License No. 37589*, Class C-61, 116 Ariz. App. 99, 567 P.2d 1228 (1977). The author of Note, *Supremacy of the Bankruptcy Act: The New Standard of Perez v. Campbell*, 40 GEO. WASH. L. REV. 764, 773-74 (1972), predicted that the statute held unconstitutional in *Grimes* could be challenged successfully.

103. These debts are not dischargeable under the Bankruptcy Reform Act of 1978 (relevant section to be codified at 11 U.S.C. § 523(a)(2)) nor under the superseded section, 11 U.S.C. § 35(a)(2) (1976). The fiduciary exception to discharge in bankruptcy (to be codified at 11 U.S.C. § 523(a)(4)) (superseding 11 U.S.C. § 35(a)(4) (1976)), usually has been held not to include brokers. See Annot., 42 A.L.R.2d 896, 897 (1955).

104. *Brown v. Felsen*, 99 S. Ct. 2205, 2208 (1979).

105. Pub. L. No. 91-467, 84 Stat. 992 (codified at 11 U.S.C. § 35(c)(2) (1976)). See *In re Godfrey*, 472 F. Supp. 364, 370 (M.D. Ala. 1979) (dicta); H.R. REP. NO. 1502, 91st Cong., 2d Sess. 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4156, 4156-57. This requirement is included in the Bankruptcy Reform Act of 1978, and will be codified at 11 U.S.C. § 523(c). See generally *Brown v. Felsen*, 99 S. Ct. 2205, 2208-12 (1979); *Stevenson v. Baker*, 18 Ill. App. 3d 542, 545, 310 N.E.2d 58, 61 (1974).

Constitution.¹⁰⁶

PROCEDURAL ASPECTS OF THE ILLINOIS RECOVERY FUND STATUTE

The nature and function of the proceedings which determine the liability of the various recovery funds have been the subject of several state appellate court decisions.¹⁰⁷ A number of issues may need to be resolved in the course of these proceedings including: whether the judgment obtained against a real estate licensee is based upon his activities in his professional capacity;¹⁰⁸ whether the claimant is in the class protected by the statute;¹⁰⁹ whether the cause of action accrued within a time specified by statute;¹¹⁰ whether substituted service on behalf of the licensee is proper;¹¹¹ whether a claimant exercised due diligence in obtaining recovery from the licensee;¹¹² whether a claimant is limited to recovery of compensatory damages;¹¹³ and, whether a claimant is entitled to recover interest on the judgment from the fund.¹¹⁴

106. This conclusion is applicable to other real estate recovery funds with similar discharge in bankruptcy provisions. See note 87 *supra*.

107. Real Estate Bd. v. Dalessandro, 17 Ariz. App. 181, 496 P.2d 607 (1972); Arizona Real Estate Dept. v. Arizona Land Title & Trust Co., 9 Ariz. App. 54, 449 P.2d 71 (1968); State v. Griswold, 8 Ariz. App. 361, 446 P.2d 467 (1968); State *ex rel.* Talley v. Jones, 8 Ariz. App. 173, 444 P.2d 730 (1968); Wolff v. Hoaglund, 11 Cal. App. 3d 227, 89 Cal. Rptr. 778 (1970); Jones v. Anderson, 62 Ill. App. 3d 284, 379 N.E. 2d 104 (1978); Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (1978).

108. Von Thaden v. Arizona State Real Estate Comm'r, 604 P.2d 658 (Ariz. Ct. App. 1979); Martin v. State Real Estate Comm'n, 26 Ariz. App. 239, 547 P.2d 510 (1976); Arizona Real Estate Dept. v. Arizona Land Title & Trust Co., 9 Ariz. App. 361, 449 P.2d 71 (1968); Robinson v. Murphy, 96 Cal. App. 3d 763, 158 Cal. Rptr. 246, 249 (1979); *In Re* Marriage of Powers, 96 Cal. App. 3d 440, 158 Cal. Rptr. 92, 96 (1979); McGaughey v. Fox, 94 Cal. App. 3d 645, 649, 156 Cal. Rptr. 593, 595 (1979); Lemler v. Real Estate Comm'n, 38 Colo. App. 489, 558 P.2d 591 (1976).

109. *In re* Marriage of Powers, 96 Cal. App. 3d 440, 158 Cal. Rptr. 92, 95 (1979) (discussion of the legislative exclusion of a licensee's spouse); Middelsteadt v. Karpe, 52 Cal. App. 3d 297, 124 Cal. Rptr. 840 (1975) (real estate broker was not entitled although saleswoman obtained broker's commission by fraudulent means).

110. Arizona Real Estate Dept. v. Arizona Land Title & Trust Co., 14 Ariz. App. 509, 484 P.2d 662 (1971); Jones v. Anderson, 62 Ill. App. 3d 284, 379 N.E.2d 104 (1978) Fritsch v. Texas Real Estate Comm'n, 587 S.W.2d 209, 210 (Tex. Ct. App. 1979). *Cf.* Hammer v. Real Estate Comm'n, 576 P.2d 191 (Colo. App. 1978) (statute construed part of general licensing statute but identical to statute applicable to the recovery fund).

111. Chetelat v. District Court, 586 P.2d 1335 (Colo. 1978); Chiarelli v. Mitchell, 36 Ill. App. 3d 287, 343 N.E.2d 563 (1976).

112. State *ex rel.* Talley v. McAvoy, 14 Ariz. App. 229, 482 P.2d 478 (1971); Antonio v. Hempel, 71 Cal. App. 3d 128, 139 Cal. Rptr. 304 (1977); Middelsteadt v. Karpe, 52 Cal. App. 3d 297, 124 Cal. Rptr. 840 (1975); Buonincontro v. Kloppenborg, 61 Ill. App. 3d 1041, 378 N.E.2d 635 (1978).

113. State v. Griswold, 8 Ariz. App. 361, 446 P.2d 467 (1968); Nordahl v. Franzalia, 48 Cal. App. 3d 657, 121 Cal. Rptr. 794 (1975); Circle Oak Sales Co. v. Real Estate Comm'r, 16 Cal. App. 3d 682, 94 Cal. Rptr. 232 (1971); Application of Jones, 310 Minn. 500, 246 N.W.2d 578 (1976).

114. Nordahl v. Franzalia, 48 Cal. App. 3d 657, 121 Cal. Rptr. 794 (1975); Application of Jones, 310 Minn. 500, 246 N.W.2d 578 (1976).

Proceedings Which Determine Recovery from the Fund

When a valid judgment is recovered in Illinois against a licensed real estate broker, the judgment creditor may file a verified petition for recovery from the fund in the court in which judgment was entered. The petition is then considered in a "summary manner."¹¹⁵ This proceeding affords the DRE an opportunity to challenge defective claims.

In *Jones v. Anderson*,¹¹⁶ the Illinois Appellate Court for the First District decided what type of hearing is necessary to determine the validity of a claim for recovery from the fund.¹¹⁷ The plaintiffs in *Jones* instituted an action against a licensed real estate broker in which they alleged that the broker had fraudulently converted a deposit which they had given him toward the purchase of real estate.¹¹⁸ The plaintiffs' counsel sent a copy of their complaint to the DRE when the suit was filed, but the DRE did not intervene at trial.¹¹⁹ The plaintiffs recovered a judgment against the broker, but were unsuccessful in their efforts to collect on the judgment. The plaintiffs next petitioned the court for an order permitting payment from the Illinois Real Estate Recovery Fund.¹²⁰

In response to the verified petition, the DRE stated that because the recovery fund is an indemnification fund, unknown at common law, a petitioner must plead and prove that he satisfies all requirements established by the legislature.¹²¹ The DRE contended *inter alia* that the plaintiffs had not proven that the fraud occurred on or after January 1, 1974, as required by the statute.¹²² Although the plaintiffs pleaded that the fraud was discovered in February, 1974, when a demand was made for the return of the deposit, the DRE maintained that it was just as likely that the fraud occurred when the money was deposited with the broker prior to January 1, 1974.¹²³ The lower court rejected the DRE's argument and found that the plaintiffs' petition was sufficient to show

115. ILL. REV. STAT. ch. 111, § 5718(b) (1977).

116. 62 Ill. App. 3d 284, 379 N.E.2d 104 (1978).

117. *Id.* at 285, 379 N.E.2d at 104.

118. *Id.* at 286, 379 N.E.2d at 105.

119. *Id.* The DRE has hesitated to exercise its intervention rights fully. This may be due, in part, to the department's reluctance to leave an impression that it is defending the interests of "crooked" brokers to the detriment of those persons injured by the wrongful conduct of such brokers. As of January 1, 1979, the DRE had intervened in 26 of the 163 cases it had received notice of. Status Report, *supra* note 21, at 2.

120. 62 Ill. App. 3d at 286, 379 N.E.2d at 105.

121. *Id.* See ILL. REV. STAT. ch. 111, §§ 5716, 5718 (1977).

122. ILL. REV. STAT. ch. 111, § 5718(b) (1977). The DRE also contended that notice to the DRE of the suit against the broker was defective. *Id.* § 5718(a). This defense, however, was not pursued on appeal. 62 Ill. App. 3d at 287, 379 N.E.2d at 105.

123. *Id.*

that the fraud occurred in February, 1974.¹²⁴ Consequently, the DRE appealed the court's order directing payment from the fund.¹²⁵

The appellate court in *Jones* rejected the DRE's contention that it was entitled to a "fair hearing" on the question of whether the plaintiffs had satisfied the requirements of the statute.¹²⁶ *Jones* held that the lower court was correct in proceeding in a "summary fashion" after the DRE had failed to introduce any "pleadings, affidavits or exhibits . . . which raised any material issue regarding the plaintiffs' compliance with statutory requirements."¹²⁷

The *Jones* decision would appear to produce more intervention by the DRE since in most cases this is the only method by which material facts can be ascertained by the DRE to later contest the verified claim for recovery from the fund. However, the court did not address the issue of whether the DRE must intervene and litigate issues which are immaterial in a determination of the fund's liability. No Illinois court of review has considered this matter. Since the Illinois recovery fund is patterned after the Arizona fund,¹²⁸ a survey of relevant Arizona law is helpful.

The Arizona Court of Appeals has examined the function of the post-trial hearing on several occasions.¹²⁹ The court indicated at one point that the Arizona Real Estate Board should intervene at trial if it wished to contest any issue at the subsequent hearing.¹³⁰ Upon further reflection, the court held, in *Arizona Real Estate Department v. Arizona*

124. *Id.*, 379 N.E.2d at 105-06.

125. *Id.*, 379 N.E.2d at 106.

126. *Id.* at 288-89, 379 N.E.2d at 106-07.

127. *Id.* at 288, 379 N.E.2d at 106-07.

128. Compare ILL. REV. STAT. ch. 111, § 5718 (1977 & Supp. 1978) with ARIZ. REV. STAT. ANN. § 32-2188 (1976 & Supp. 1978-1979). Portions of the Illinois statute are copied word for word from the Arizona statute. The only significant difference between the two statutory provisions is the 1978 Illinois amendment which allows for substituted service of process if the broker cannot be found to effect personal service of process. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978). With this exception, a comparison of the two statutes is useful.

129. Real Estate Bd. v. Dalessandro, 17 Ariz. App. 181, 496 P.2d 607 (1972); Arizona Real Estate Dept. v. Arizona Land Title & Trust Co., 9 Ariz. App. 54, 449 P.2d 71 (1968); State v. Griswold, 8 Ariz. App. 361, 446 P.2d 467 (1968); State ex rel. Talley v. Jones, 8 Ariz. App. 173, 444 P.2d 730 (1968).

130. State ex rel. Talley v. Jones, 8 Ariz. App. 173, 444 P.2d 730, 732 (1968) (dicta). The real estate board intervened at trial and defended unsuccessfully on the ground that the defendants' wrongful activities occurred prior to the effective date of the recovery fund statute. *Id.* at 174, 444 P.2d at 731. The appellate court held that the commissioner's failure to appeal the decision of the trial court estopped the state from reasserting the same contention at the post-trial hearing. *Id.* at 175, 444 P.2d at 732. The decision may have been influenced by the court's sympathy for the plaintiff's plight. The court described her as "an elderly widow [who] decided to invest her life's savings in real estate mortgages" which were never obtained by the defendants. *Id.* at 173, 444 P.2d at 730.

Land Title & Trust Co.,¹³¹ that the real estate board was not required to intervene in order to contest issues which only concerned recovery from the fund.¹³²

In *Arizona Land Title & Trust Co.*, the Arizona Real Estate Board received notice of the civil action against the broker in accordance with the statute, but it did not exercise its statutory right to intervene.¹³³ After the plaintiff obtained a default judgment against the broker, an application was made to the court for an order that the Arizona Real Estate Board pay \$10,000 from the fund in partial satisfaction of the judgment.¹³⁴ The order was granted and the board appealed on the basis of *inter alia* whether the acts upon which the judgment was based occurred on or after July 1, 1964.¹³⁵

The plaintiff contended that the real estate board, by failing to intervene in the original action against the broker, was precluded from raising this defense at the hearing.¹³⁶ The Arizona Court of Appeals assessed the merits of plaintiff's argument by examining the legislative history of the recovery fund statute. Specifically, the court determined the result intended by the legislature when the real estate board exercised, or failed to exercise, its statutory right to intervene.¹³⁷ The court explained that an intervenor takes a case as he finds it, and is not permitted to enlarge the scope of the proceedings or raise new issues which might delay or complicate the matter.¹³⁸ The appellate court stated that the language in the statute to the effect that "[t]he court shall proceed . . . in a summary manner" did not mean that issues involving the liability of the fund must be included at trial.¹³⁹ Nor did the legislature intend to diminish the rights of the parties involved according to the court, but rather it attempted to speed the proceedings.¹⁴⁰ However, by specifying that the real estate commissioner must be notified at the commencement of the principal action, the court found that this action

131. 9 Ariz. App. 54, 449 P.2d 71 (1968).

132. *Id.* at 58, 449 P.2d at 75.

133. ARIZ. REV. STAT. ANN. § 32-2188(A) (1976).

134. 9 Ariz. App. at 56-57, 449 P.2d at 73-74.

135. *Id.* at 57, 449 P.2d at 74. The Arizona recovery fund is inapplicable to judgments based upon actions of licensees that occurred prior to July 1, 1964. ARIZ. REV. STAT. ANN. § 32-2188(B) (1976).

136. 9 Ariz. App. at 57, 449 P.2d at 74.

137. *Id.* at 57-58, 449 P.2d at 74-75.

138. *Id.* at 58, 449 P.2d at 75.

139. *Id.* (construing ARIZ. REV. STAT. ANN. § 32-2188(C) (1976)). The court stated that the "term 'summary manner' means only that the court proceed without delay or formality in a short, concise, and immediate proceeding." 9 Ariz. App. at 58, 449 P.2d at 75.

140. *Id.*

should bind the fund in some way.¹⁴¹

Consequently, the Arizona Court of Appeals held in *Arizona Land Title & Trust Co.* that the real estate board may not litigate the amount and fact of the broker's liability if the board fails to intervene or if it intervenes and is unsuccessful in the defense asserted.¹⁴² In the instant case, the board could raise the issue of when the broker's acts occurred because it was not attacking the propriety of the judgment. Rather, the board questioned whether the judgment obtained was one which could be satisfied by the fund.¹⁴³ The court concluded that the plaintiff had not met its burden of establishing that the broker's act occurred on or after July 1, 1964, and reversed the lower court's decision.¹⁴⁴ The case was remanded because the plaintiff had not been given an opportunity in the lower court to present evidence as to the date of the broker's act.¹⁴⁵

The holding in *Arizona Land Title & Trust Co.* delineates issues which will have a binding effect on the Arizona fund at trial. By limiting these issues to the amount and fact of the broker's liability, the Arizona Court of Appeals narrowed the field of cases in which intervention need occur. In contrast, *Jones v. Anderson*¹⁴⁶ provides the DRE with little guidance as to what issues it must litigate at trial.¹⁴⁷

The situations in which the DRE is required to intervene to protect the interests of others should be limited as much as possible. Otherwise, intervention may occur in instances where no petition for recovery is asserted.¹⁴⁸ A claim for recovery from the fund will not be brought if the lawsuit is settled, the defendant broker successfully defends the suit, or the broker fully satisfies a judgment against him. Un-

141. *Id.* at 58-59, 449 P.2d at 75-76.

142. *Id.* at 59, 449 P.2d at 76.

143. *Id.* at 58, 449 P.2d at 75. The court did "not believe that this statute, permitting intervention, mandates that . . . issues, completely collateral to that plenary action, be injected into it." *Id.*

144. *Id.* at 61, 449 P.2d at 78.

145. *Id.* Apparently, the trial court judge relied on *State ex rel. Talley v. Jones*, 8 Ariz. App. 173, 444 P.2d 730 (1968), discussed at note 130 *supra*. On remand, the lower court granted judgment to the plaintiff for \$10,000 which was appealed by the commissioner. The appellate court reversed the lower court's finding that the fraud occurred after July 1, 1964, on the grounds that sufficient weight was not given to the broker's deposition which tended to show that the judgment was based on activities which occurred prior to that date. *Arizona Real Estate Dept. v. Arizona Land Title & Trust Co.*, 14 Ariz. App. 509, 511, 484 P.2d 662, 664 (1971).

146. 62 Ill. App. 3d 284, 379 N.E.2d 104 (1978).

147. See text accompanying notes 116-27 *supra*.

148. See *Duty*, *supra* note 6, at 16, where the author observed:

[The] 'right to intervene' has placed a heavy burden upon the Arizona Real Estate Board. It has caused the board to be faced with the dilemma of intervening in many actions, which would never result in collection from the fund, or in the alternative, allowing actions to go by default, with resulting fund liability in large part pre-determined.

productive intervention wastes the resources of the DRE. Its efforts should be focused upon the cases which will result in claims against the fund. Moreover, intervention may complicate the broker's trial should the DRE litigate issues pertaining to the liability of the fund which are irrelevant to the establishment of the broker's liability to the plaintiff.¹⁴⁹

The Illinois recovery fund statute follows its Arizona counterpart and empowers the DRE "to defend the action [against the broker], or take whatever other action it deems appropriate on behalf and in the name of the defendant."¹⁵⁰ A liberal interpretation of the quoted language would permit the DRE to pursue issues irrelevant to the establishment of the broker's liability at trial. However, the Illinois Civil Practice Act¹⁵¹ provides that the court may preclude a party that intervenes as a matter of right from raising new issues or interfering with the litigation.¹⁵² Therefore, the holding in *Arizona Land Title & Trust Co.* should be given effect in any case where the plaintiff's claim can be enforced against the broker.

The applicability of this case is limited by the 1978 Illinois substituted service amendment.¹⁵³ When substituted service is used the issue of a broker's culpability is relevant only to whether the plaintiff will recover from the fund because any judgment obtained against the broker is enforceable as to the recovery fund only.¹⁵⁴ In such cases there is no danger of complicating the proceedings by litigating issues pertaining only to the fund's liability.

Distribution of Funds When Broker's Maximum Liability is Exceeded

The Illinois General Assembly limited the maximum payment from the recovery fund in connection with a single "act, representation, transaction, or conduct" involving a real estate broker to \$10,000.¹⁵⁵

149. *E.g.*, whether notice to the DRE of the suit was timely, ILL. REV. STAT. ch. 111, § 5718(a) (1977), or whether plaintiff's cause of action against a broker is based upon grounds which makes the judgment eligible for reimbursement from the fund. *Id.* § 5716.

150. *Id.* § 5721. Compare ARIZ. REV. STAT. § 32-2191 (1976).

151. ILL. REV. STAT. ch. 110, §§ 1-100 (1977).

152. *Id.* § 26.1(6).

153. *Id.* ch. 111, § 5718(a) (Supp. 1978).

154. *Id.*

155. *Id.* § 5716 (1977). See *Fox v. Prime Ventures, Ltd.*, 86 Cal. App. 3d 333, 150 Cal. Rptr. 202 (1978), for a discussion of the equivalent California provision, CAL. BUS. & PROF. CODE § 10471 (West Supp. 1979). See also *Dombalian v. Fox*, 88 Cal. App. 3d 763, 152 Cal. Rptr. 86 (1979) (series of fraudulent acts were part of same transaction). Almost all of the recovery fund statutes place a maximum limit on the amount of recovery per transaction involved. *E.g.*, GA. CODE ANN § 84-1424(a) (1979) (\$10,000); MINN. STAT. ANN. § 82.34 subd. 7 (West Supp. 1979) (\$20,000). However, MD. CODE art. 56, § 217A (1972 & Supp. 1978), imposes no maximum recov-

The statute provides that this amount should be shared equitably among those entitled to a portion of the judgment. The legislature recognized the possibility that the activities of a few brokers might result in numerous claims which could overwhelm the resources of the fund. Consequently, the liability of the fund for the activities of a single broker is limited to \$50,000. The statute does not state how this latter amount should be divided among a broker's judgment creditors.¹⁵⁶

No Illinois court of appeal has reviewed a case in which the division of the \$50,000 maximum amount was in controversy, although a circuit court addressed this problem in *Department of Registration & Education v. Martino*.¹⁵⁷ In *Martino*, claims against the fund arising out of the activities of a real estate broker exceeded the \$50,000 limit. The DRE filed an interpleader action in which unknown claimants were served by publication.¹⁵⁸ Two judgment creditors had already obtained orders from the circuit court authorizing recovery from the fund. The DRE urged the court to rescind these orders and distribute the available money on a pro rata basis.¹⁵⁹

Those judgment creditors who received orders from the circuit court for payment from the fund, or stood to recover if the funds available were distributed on a "first come first served" basis, filed motions and briefs objecting to the DRE's proposal.¹⁶⁰ These creditors contended that Illinois' lawmakers were aware of other state statutes which authorized real estate recovery funds.¹⁶¹ If the legislature intended the limited funds to be distributed on a pro rata basis, the creditors reasoned, it could have provided for that method as had the legislatures of

ery restriction. A bill was introduced in the Maryland Senate in order to place a limit on recovery of \$25,000 per transaction, but the bill was not enacted despite the endorsement of the Maryland Real Estate Commission. MD. S. No. 274 (1979).

156. ILL. REV. STAT. ch. 111, § 5716 (1977). This section provides, in pertinent part:

The maximum liability against such Fund arising out of any one act shall be as provided in this Section and the judgment order shall spread the award equitably among all co-owners or otherwise aggrieved persons, if any. The maximum liability against such Fund arising out of the activities of any single broker . . . shall be the sum of \$50,000.

Most recovery fund statutes place a ceiling on the maximum liability of the fund for the acts of a single licensee. *E.g.*, GA. CODE ANN. § 84-1424(a)(2) (1979) (\$20,000); OKLA. STAT. ANN. tit. 59, § 858-604C (West Supp. 1978-1979) (\$50,000). *But see, e.g.*, MD. CODE ANN. art. 56, § 217A (1972 & Supp. 1978) (no maximum restriction per licensee).

157. No. 77 L. 714 (18th Jud. Cir. Mar. 8, 1978) (final order).

158. *Id.* (18th Jud. Cir. Dec. 23, 1977) (interim order).

159. Complaint of DRE at 8, *Department of Reg. & Educ. v. Martino*, No. 77 L. 714 (18th Jud. Cir. Mar. 8, 1978).

160. *E.g.*, Brief in Support of Defendants' Motion for Summary Judgment, *Department of Reg. & Educ. v. Martino*, No. 77 L. 714 (18th Jud. Cir. Mar. 8, 1978).

161. *Id.* at 6-8.

other states.¹⁶²

The circuit court in *Martino* refused to rescind the orders which it already had granted for payment from the fund. The court held that in the absence of specific statutory language, claims should be paid from the remaining funds "in the order that the original verified claims for recovery from the Real Estate Recovery Fund were filed."¹⁶³ The circuit court premised its order on another provision of the recovery fund statute¹⁶⁴ which specifies that such an order of payment is to be followed in the event that the amount deposited in the recovery fund is insufficient to satisfy all court approved claims.¹⁶⁵

The circuit court's reliance on this section is misplaced. In drafting the section, the legislature assumed any shortage of funds would be temporary, since the recovery fund statute provides for an additional license assessment if the assets of the recovery fund fall below a specified amount.¹⁶⁶ However, in *Martino*, the circuit court's order, in effect, eliminated all possibility of recovery from the fund for some of the broker's judgment creditors, except in the unlikely event that the broker pays back a portion of the \$50,000 expended on his behalf.¹⁶⁷

The chief advantage of the method of distribution set forth in *Martino* is its simplicity of administration. The priority of an order for recovery from the fund is determined by the date that the verified claim was filed. By comparison, problems would arise if the measuring device was the accrual of the cause of action against the broker. The timing of this event is often difficult to establish,¹⁶⁸ and certainly not as precise as a time stamp on a pleading. However, the result in *Martino* is not necessarily an equitable one. A judgment creditor who delays petitioning the fund with the intention of collecting directly from the broker will not receive any reimbursement if more than \$50,000 in claims already have been awarded from the fund. A meritorious claim

162. *Id.* at 8. The following statutes provide for a pro rata method of distribution when the maximum amount for a single broker is exceeded: CAL. BUS. & PROF. CODE § 10474.5 (West Supp. 1979); COLO. REV. STAT. § 12-61-302(2) (1978); MINN. STAT. ANN. § 82.34 subd. 12(b) (West 1979); NEV. REV. STAT. § 645.848 (1977); N.D. CENT. CODE § 43-23.2-08 (1978); OHIO REV. CODE ANN. § 4735.12(D) (Page Supp. 1978); VA. CODE § 54-765.5C (1978).

163. No. 77 L. 714 (18th Jud. Cir. Mar. 8, 1978) (final order).

164. ILL. REV. STAT. ch. 111, § 5718(e) (1977).

165. No. 77 L. 714 (18th Jud. Cir. Feb. 24, 1978) (interim order).

166. ILL. REV. STAT. ch. 111, § 5717 (1977).

167. As of January 1, 1979, only one broker had agreed to make restitution to the fund. Status Report, *supra* note 21, at 2-3.

168. See *Arizona Real Estate Dept. v. Arizona Land Title & Trust Co.*, 14 Ariz. App. 509, 484 P.2d 662 (1971).

may go uncompensated simply because the judgment creditor did not file his petition as soon as others were filed.

California amended its recovery fund in 1967, authorizing the judiciary to distribute the maximum amount available for the activities of a real estate licensee on a pro rata basis to all aggrieved parties or "as the court deems equitable."¹⁶⁹ Subsequently, the California Court of Appeal examined this provision in *Shirai v. D'Orazi*.¹⁷⁰ The plaintiffs in *Shirai* obtained a judgment against the defendant real estate broker but were unsuccessful in their attempts to recover the amount of the judgment from the broker. The plaintiffs applied for and received an order directing the California Real Estate Commissioner to pay the judgment amount from the recovery fund.¹⁷¹

Subsequently, the commissioner filed a petition alleging that he had learned of other parties who were asserting claims against the fund as a result of the defendant broker's activities. This petition named three additional claimants as parties in the action. The commissioner requested a superseding order to vacate the order for full payment to the plaintiffs from the fund, grant the commissioner's petition to prorate, direct unknown claimants to file their claims with the court and grant publication of notice.¹⁷² The trial judge ordered publication of notice to all claimants to file their applications, but refused to vacate the earlier court order of payment on behalf of the plaintiffs.¹⁷³

Although the trial court held that the order for payment from the fund was final and could not be upset by a later order altering the payment to a pro rata share,¹⁷⁴ the California Court of Appeal stated that such reasoning was "but an assertion of the priority of judgment or order which is specifically proscribed by the very legislation under which the plaintiffs seek to recover."¹⁷⁵ The appellate court reversed and remanded with instructions to the trial court to determine the validity of the claims filed following the published notice and to direct proportionate sharing by all qualified claimants, including the plain-

169. CAL. BUS. & PROF. CODE § 10474.5 (West Supp. 1979).

170. 57 Cal. App. 3d 276, 127 Cal. Rptr. 549 (1976).

171. *Id.* at 279, 127 Cal. Rptr. 551.

172. *Id.* at 280, 127 Cal. Rptr. at 550-51.

173. *Id.*, 127 Cal. Rptr. at 551.

174. *Id.*

175. *Id.* The California statute states in pertinent part:

Distribution of such moneys shall be among the persons entitled . . . without regard to the order of priority in which their respective judgments may have been obtained or their claims have been filed.

CAL. BUS. & PROF. CODE § 10474.5 (West Supp. 1979).

tiffs, in the amount available from the fund.¹⁷⁶

The California Court of Appeal in *Shirai* criticized the pro rata provision of the recovery fund. The court noted that the statute failed to require publication of notice to prospective claimants upon the filing of a claim, or to specify a cut-off date for filing of claims.¹⁷⁷ While the statutory reference to "prospective claimants"¹⁷⁸ indicated to the court that the legislature contemplated the consideration of claims which had not been filed when the first action was brought, the court urged that the legislature consider the enactment of clarifying amendments.¹⁷⁹

A PROPOSAL FOR AMENDING THE ILLINOIS REAL ESTATE RECOVERY FUND *Distribution of Limited Funds*

When a limited amount of money must be divided in some manner among numerous claimants in a real estate recovery fund action, one solution to the problems created is simply to remove the limitation. In fact, several recovery fund statutes place no ceiling on the maximum amount which may be recovered by the public as a result of the activities of a single licensee.¹⁸⁰

This approach has two clear advantages. First, all of the licensee's claimants would be treated equally, as is the case when a pro rata method is used to divide limited funds. However, without a limitation on the fund's liability for the activities of one licensee, it is unnecessary for the trial court to undertake the difficult task of determining the number of claimants entitled to recovery, or the pro rata share of funds that each one should receive. Second, a creditor who possesses a judgment against a licensee having many other outstanding judgments entered against him, may suffer as severe a financial injury as another creditor who possesses the only judgment arising from the activities of a more "honest" licensee.

Nonetheless, the fear remains that one licensee may generate so many claims that the solvency of the recovery fund would be under-

176. 57 Cal. App. 3d at 281, 127 Cal. Rptr. at 552.

177. *Id.* at 280, 127 Cal. Rptr. at 552.

178. CAL. BUS. & PROF. CODE § 10474.5 (West Supp. 1979).

179. 57 Cal. App. 3d at 280-81, 127 Cal. Rptr. at 552. The Virginia recovery fund pro rata provision was designed to solve the problems noted by the *Shirai* court. See VA. CODE § 54-765.5C (1978).

180. CONN. GEN. STAT. ANN. § 20-324 (West Supp. 1979) (eff. date Oct. 1, 1969); DEL. CODE ANN. tit. 24, § 2921 (Supp. 1978) (eff. date July 11, 1975); MD. CODE ANN. art. 56, § 217A (1972 & Supp. 1979) (eff. date July 1, 1971); N.J. STAT. ANN. §§ 45:15-34 to 45:15-42 (West 1978) (eff. date Feb. 1, 1977); R.I. GEN. LAWS § 5-20.5-5 (Supp. 1978) (eff. date May 11, 1978).

mined. No broker has generated enough claims to imperil the financial soundness of the Illinois fund.¹⁸¹ Under ordinary circumstances, the DRE should know of such a broker in time to institute license revocation proceedings before numerous cases arise. However, claims may arise almost simultaneously because the injurious activities of a broker often occur in a brief period of time.¹⁸²

The majority of recovery fund statutes which place no ceiling on the maximum liability for one licensee have been in effect for less than five years.¹⁸³ In fact, one of these funds is experiencing financial difficulties.¹⁸⁴ The Illinois General Assembly should defer any action which would eliminate the limitation until the legislature can assess the financial stability of other recovery funds which have no such limitation. Nevertheless, the legislature should take notice of the fact that the balance in the Illinois fund has risen each year of its existence and currently amounts to over \$1,000,000.¹⁸⁵ With such assets the fund should be able to reimburse claims against brokers whose \$50,000 limit has been exceeded without threatening the fund's solvency.

For this reason, the Illinois General Assembly should suspend the maximum liability of the fund for the acts of a single broker provided that at the end of the previous calendar year the balance in the fund was greater than an amount specified by the legislature. This minimum balance would be determined by the legislature's estimate of the funds needed to pay claims totaling less than \$50,000 per broker, without assessing licensees an additional fee.¹⁸⁶ Should the balance in the recov-

181. As of January 1, 1979, claims against the fund exceeded the \$50,000 limitation per broker for only one broker. Status Report, *supra* note 21, at 2. Three claims were denied on this basis after publication was made to alert all potential claimants that the limitation had been exceeded. *Id.* See text accompanying notes 157-65 *supra*. In retrospect, if these claimants had been allowed to pursue their claims the fund would not have been threatened.

182. One broker accumulated numerous earnest money deposits before converting the funds for his own use. See *Pacelli v. Kloppenberg*, 65 Ill. App. 3d 150, 382 N.E.2d 570 (1978); *Buonincontro v. Kloppenberg*, 61 Ill. App. 3d 1041, 378 N.E.2d 635 (1978).

183. See note 180 *supra*.

184. The Maryland Real Estate Guaranty Fund, Md. CODE ANN. art. 56, § 217A (1972 & Supp. 1979), is in financial danger because claims resulting from the acts of one licensee threaten to overwhelm the resources of the fund. See Letter from Pauline Masters, Assistant Director Maryland Real Estate Comm'n, to author (August 14, 1979) (this letter is on file at the Chicago-Kent Law Review). This problem has been exacerbated because there is no maximum limit per transaction on the amount which may be awarded from the Maryland fund. See note 155 *supra*.

185. Status Report, *supra* note 21, at 3.

186. The recovery fund statute provides for an additional payment of \$10 when a broker renews his license (\$5 for a salesman) if the balance in the fund is less than \$150,000 on December 31, of any year. ILL. REV. STAT. ch. 111, § 5717 (1977). A minimum balance of \$500,000, for example, would probably result in the desired outcome of allowing all claims without requiring an additional renewal payment. As of January 1, 1979, the DRE estimated that the "projected liability" of all outstanding claims against the fund was \$461,699.96 although the balance in the fund as of that date was \$1,008,074.65. Subtracting the "projected liability" of the fund from the total

ery fund fall below this amount on December 31 of any year, the \$50,000 limit would be reactivated until the balance in the fund exceeded this amount at the close of a subsequent year. The DRE would notify the court if the \$50,000 limit was in effect.

This proposal is a compromise between statutes which do not place a limitation on the recovery fund's liability and statutes which disburse funds on a pro rata basis when such a limit is exceeded. If the present trend of increased Illinois recovery fund assets continues, the proposed maximum liability provision would not be activated.¹⁸⁷ Should the amount deposited in the fund happen to fall below the amount decided by the legislature on December 31, the limitation provision might preclude some claims if funds are distributed by the court on a first-come, first-served basis.¹⁸⁸ Although a statutory pro rata method of distribution would be more equitable, designing a workable plan is a complicated task.¹⁸⁹ Legislative efforts would be more productive if directed towards a reduction of the situations in which the \$50,000 limitation is applicable, while ensuring that the financial integrity of the recovery fund is not compromised.

Proceedings Which Determine Recovery from the Fund

The statutory right of persons with legitimate claims to compensation from the fund must be weighed against the responsibility of the DRE to manage the fund effectively.¹⁹⁰ Several states allow the real estate licensing agency to question the validity of a judgment obtained against a licensee at the post-trial hearing, but make no provision for the agency to intervene at trial.¹⁹¹ The recovery funds of these states

balance, \$546,374.69 would remain in the fund. This crude calculation does not take into account new claims that will be filed in the future. On the other hand, it also does not take into account the income that the fund receives each year in the form of licensing fees and interest accrued on deposits in the fund. For example, in fiscal year (July 1-June 30) 1978, the fund received \$163,740.00 in licensing fees from new brokers and \$54,018.76 in interest. *See* Status Report, *supra* note 21, at 1, 3.

187. *But see* Status Report, *supra* note 21, at 3. Payments from the fund during the first six months of fiscal year (July 1-June 30) 1979, almost equaled the amount paid from the fund during all of fiscal year 1978. This situation may be due to the likelihood that attorneys are now more familiar with the recovery fund remedy. However, during the first six months of fiscal year 1979, the income of the recovery fund remained greater than the amount paid to claimants. *Id.*

188. *See* Department of Reg. & Educ. v. Martino, No. 77 L. 714 (18th Jud. Cir. Mar. 8, 1978), discussed in text accompanying notes 157-68 *supra*.

189. *See generally* Shirai v. D'Orazi, 57 Cal. App. 3d 276, 127 Cal. Rptr. 549 (1976). *But see* VA. CODE § 54-765.5C (1978), which may prove to be a feasible pro rata provision.

190. *See* REVIEW OF FLORIDA REAL ESTATE LAW, *supra* note 3, at 35-36.

191. CAL. BUS. & PROF. CODE §§ 10470-10483 (West 1964 & Supp. 1979); IDAHO CODE § 54-2035 (1979); MINN. STAT. ANN. § 82.34 (West Supp. 1979); N.D. CENT. CODE §§ 43-23.2-01 to 43-32.2-13 (1978); OHIO REV. CODE ANN. § 4735.12 (Page Supp. 1978); S.D. COMPILED LAWS ANN. §§ 36-21-55 to 36-21-71 (1977); UTAH CODE ANN. §§ 61-2a-1 to 61-2a-12 (1978).

require less administration on the part of the licensing agency since it must become involved only when a claim is filed for indemnification. In Illinois, the DRE is involved more often because intervention may occur in situations which will not result in a claim for recovery.¹⁹²

The Illinois fund is intended to be used as a remedy of last resort,¹⁹³ but it should be a genuine one. The Illinois statute protects a claimant from having to litigate the broker's liability a second time in the post-trial hearing. In contrast, the recovery fund statutes which do not grant the licensing agency the right of intervention, in effect require a claimant to litigate some issues twice.¹⁹⁴ Intervention of the DRE in cases that ultimately will not lead to a claim for recovery are justified by the fact that the path to reimbursement is less complicated for a party that does file a claim.

However, the Illinois General Assembly should specify which issues decided at the licensee's trial will have a binding effect on the fund at the post-trial hearing. The best approach would be a codification of the rule of law announced by the Arizona Court of Appeals in *Arizona Real Estate Department v. Arizona Land Title & Trust Co.*¹⁹⁵

[T]he binding effect of the . . . action [against the broker] upon the liability of the compensation fund will be limited to the fact and the amount of the broker's liability, but not as to whether the claim giving rise to that liability is one falling within the provisions of [the recovery fund].¹⁹⁶

If enacted by the Illinois legislature, this provision would require a claimant to establish a broker's liability only once, at the broker's trial. But the DRE could allege at the post-trial hearing that the judgment was ineligible for recovery. For example, if all or some of the damages awarded were for loss of market value, the claimant's loss would be beyond the coverage of the fund. The DRE would not be obligated, as the court in *Jones v. Anderson*¹⁹⁷ implied, to interject issues at the broker's trial which are irrelevant to an assessment of his liability.¹⁹⁸ But this proposal should not be applicable to cases in which a judgment is obtained against a broker following substituted service on the director of the DRE.

Where substituted service is employed the judgment has no valid-

192. See text accompanying notes 146-54 *supra*.

193. See Chicago Tribune, Aug. 19, 1979, § 14, at 1. See generally Duty, *supra* note 6, at 15.

194. See Duty, *supra* note 6, at 16, in which the author states that in California, the "Commissioner may—and on occasion does relitigate the entire case."

195. 9 Ariz. App. 54, 449 P.2d 71 (1968).

196. *Id.* at 57, 449 P.2d at 74.

197. 62 Ill. App. 3d 284, 379 N.E.2d 104 (1978).

198. *Id.* at 288-89, 379 N.E.2d at 106-07.

ity against the licensee.¹⁹⁹ The real party of interest is the DRE, given its status as manager of the recovery fund. The Illinois General Assembly should combine the broker's trial and the post-trial hearing into one proceeding once a party obtains a court order for substituted service. In this proceeding, the legislature should permit the DRE to litigate all issues pertaining to the broker's liability as well as whether the statutory requirements of the fund have been met. This latter grant of authority would allow the DRE, during this proceeding, to challenge whether the substituted service order should have been granted by the court.

Due Process and License Revocation

The revocation and suspension provisions of the various recovery fund statutes differ in their protection of a licensee's due process rights. The Illinois General Assembly could provide within the recovery fund statute that a broker be given an opportunity to participate at the post-trial hearing, as other states have.²⁰⁰ But there are drawbacks to this procedure. It allows the broker to question his own judicially established liability. It permits the broker to attempt to thwart his judgment creditor's recovery from the fund. Finally, it would complicate the post-trial hearing.

The Illinois automatic termination provision which revokes the broker's license and renders him ineligible to obtain another one until the fund is repaid would appear to meet minimum procedural due process standards.²⁰¹ But the legislature might also consider a codification of the DRE's administrative practice in which the department sends a letter to brokers whose activities result in payment from the fund, allowing ten days to show cause why their licenses should not be terminated.²⁰²

Nevertheless, the DRE must discontinue its practice of applying the automatic termination clause when the broker is made a party by substituted service. Such enforcement procedures are not authorized by the statute, nor do they comport with the broker's procedural due

199. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978).

200. CAL. BUS. & PROF. CODE § 10473.1 (West Supp. 1978); MINN. STAT. ANN. § 82.34 (West Supp. 1979); N.D. CENT. CODE § 43-23.2-06 (1978); S.D. COMPILED LAWS ANN. § 36-21-64 (1977).

201. See text accompanying notes 68-75 *supra*.

202. DRE Advisor, *supra* note 70. The Colorado recovery fund statute specifies that the licensing agency must give notice of hearing to the licensee to show cause why his license should not be suspended or revoked when payment is made from the fund on account of his activities. COLO. REV. STAT. § 12-61-304 (1978).

process right to notice of the trial proceeding.²⁰³ In response to these criticisms, the DRE is considering the feasibility of alternative procedures.²⁰⁴

The DRE is studying whether license revocation proceedings should be instituted whenever the director of the DRE receives substituted service since a broker's failure to notify the department of his current address is a ground for revocation.²⁰⁵ Also, should a former licensee apply for a new license, the DRE would assert its subrogation rights in a new lawsuit if any monies were previously paid from the fund on his account.²⁰⁶

The alternative procedures should be implemented. The state, through the exercise of its regulatory function, has a compelling interest in prohibiting a broker who evades service from working in that capacity elsewhere in Illinois.²⁰⁷ But it has a lesser interest in recouping sums disbursed from the fund. The proposed administrative practices comport with minimum requirements of procedural due process because they do not burden the broker with the payment of a judgment obtained by substituted service, as a condition of eligibility for a new license. They also provide better financial protection of the fund than current procedures because any judgment that the DRE obtained against a duly served former licensee would be directly enforceable against him.

Supremacy Clause and Discharge in Bankruptcy

Illinois' statutory provision which states that a discharge in bankruptcy does not alter the requirement that the recovery fund must be reimbursed before a broker is eligible for another license,²⁰⁸ is in direct conflict with federal bankruptcy law. Congress has specified that the bankruptcy court is the exclusive forum for determining the dischargeability of debts involving fraud, misrepresentation or deceit.²⁰⁹

203. ILL. REV. STAT. ch. 111, § 5718(a) (Supp. 1978). See text accompanying notes 76-86 *supra*.

204. Letter from Henry Arkin, Technical Advisor for the DRE, to author (Jan. 7, 1980) (letter on file at the Chicago-Kent Law Review).

205. ILL. REV. STAT. ch. 111, §§ 5730(a), 5732(e)(21) (1977).

206. *Id.* § 5722.

207. In recognition of this interest, the Illinois General Assembly exempted The Real Estate Brokers and Salesmen License Act from the more stringent notice requirements of the Administrative Procedure Act, *id.* ch. 127, §§ 1001-1021, 1010, requiring only that notice of a hearing be mailed to the last known address of a broker. *Id.* ch. 111, § 5743.

208. *Id.* ch. 111, § 5718(d).

209. See text accompanying notes 99-106 *supra*.

According to the rule stated by the United States Supreme Court,²¹⁰ the Illinois recovery fund statute is in violation of the Federal Constitution's supremacy clause. The Illinois General Assembly may wait until this provision is challenged in court before it amends the recovery fund statute, or it may do so on its own initiative. The latter course would be preferable since the legislature could enforce the Constitution without sacrificing the aims of the present provision.

Ordinarily, the underlying debt of a claim for recovery from the fund is not dischargeable in bankruptcy since a debt based upon grounds such as fraud, misrepresentation or deceit cannot be discharged if the creditor files a timely application in bankruptcy court that the debt is not dischargeable.²¹¹ Consequently, the Illinois General Assembly should require, as a condition of recovery from the fund,²¹² that a claimant who has notice must contest in bankruptcy court any judgment debt which a bankrupt attempts to discharge. However, the claimant should not be required to wait until the bankruptcy is concluded before recovering from the fund if all other statutory requirements of the fund have been met. After a successful claimant has assigned his rights in the judgment to the DRE, it should be required to challenge in bankruptcy court any attempt by a former licensee to discharge the debt, if proper notice is given.²¹³

This proposed change in the fund's "discharge in bankruptcy" provision would prevent, in a constitutional manner, a disciplined broker from obtaining a new license until the fund has been reimbursed. It might also improve collection efforts because the DRE would hold a valid judgment debt against the bankrupt yet his total pre-bankruptcy liabilities would be diminished by the amount of his discharged debts.²¹⁴ Meanwhile, the DRE would hold a valid judgment debt

210. *Perez v. Campbell*, 402 U.S. 637 (1971); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

211. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2590 (1978) (to be codified at 11 U.S.C. § 523(a)(2) (replacing 11 U.S.C. § 35(a)(2) (1976)).

212. Recently, in *Buonincontro v. Kloppenborg*, 61 Ill. App. 3d 1041, 378 N.E.2d 635 (1978), the Illinois Appellate Court for the Second District held that the current statutory provision which requires that a judgment creditor "has diligently pursued his remedies against all the judgment debtors . . . in the transaction for which he seeks recovery from the Real Estate Recovery Fund," ILL. REV. STAT. ch. 111, § 5718(c)(6) (1977), does not mandate that a creditor allege that he has challenged a broker's attempt to discharge a debt based upon fraud. 61 Ill. App. 3d at 1043-44, 378 N.E.2d at 637.

However, the DRE could have interposed the discharge of the debt as a defense to recovery from the fund. The statute authorizes the DRE to "take whatever . . . action it deems appropriate on behalf and in the name of the defendant." ILL. REV. STAT. ch. 111, § 5721 (1977).

213. This requirement would encompass the situation where a disciplined licensee files for bankruptcy after payment from the fund has been made.

214. See Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735, 739 (1971).

against him.

CONCLUSION

The Illinois Real Estate Recovery Fund is a valuable remedy for members of the public who have been injured by the unlawful activities of real estate licensees. However, the fund should not operate to the detriment of a licensee's constitutional rights. While the DRE is charged with administering the fund, this duty must be balanced against the importance of retaining the fund as a genuine remedy of last resort.

In order to promote the equitable and efficient operation of the fund, the Illinois General Assembly should suspend the fund's liability limitation for a single broker providing the balance in the fund at the end of the previous year is greater than an amount specified by the legislature. It should limit the binding effect of the broker's trial upon the fund to the amount and fact of the broker's liability. The legislature should create an exception to this rule when judgment is obtained against the broker on the basis of substituted service. In this situation, the broker's trial and the post-trial hearing on whether the statutory requirements of the fund have been satisfied should be combined in one proceeding.

For constitutional and statutory reasons, the DRE must end its practice of automatically terminating the licenses of brokers upon payment from the fund when substituted service is used. Instead, the DRE should implement its scheme to institute license revocation proceedings and exercise its subrogation rights. Finally, to avoid conflict with federal bankruptcy law, the Illinois General Assembly should repeal the recovery fund provision which requires a broker who has been discharged in bankruptcy from a judgment debt to reimburse the fund prior to the issuance of another license. Instead, the judgment creditor should be required to contest in bankruptcy court a discharge of a judgment debt as a condition of recovery from the fund. Where the fund has satisfied a claim, the DRE should be charged with the duty of contesting the broker's subsequent discharge of a judgment debt in bankruptcy court.

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LAWRENCE F. DOPPELT

In Memoriam

Professor Larry Doppelt was a beloved member of the faculty at Chicago-Kent College of Law. He specialized in labor law and helped establish the LL.M. Program in Labor Law. Professor Doppelt also was instrumental in the first program of the Kenneth M. Piper Lectureship Series. This inaugural issue is dedicated to his memory.